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**AUG 16 2006**

**OFFICE OF PETITIONS**

In re Application of	:	
Stephens et al.	:	
Application No. 10/768,489	:	
Filed: January 30, 2004	:	DECISION ON
Title of Invention:	:	PETITION
SOYBEAN VARIETY XB19U04	:	

This is a decision in response to the "Petition to Withdraw the Holding of Abandonment - Notice of Allowance not Received", filed June 20, 2006. The petition is properly treated under 37 CFR 1.181(a).

The Petition is **dismissed**.

Any further petition to revive the above-identified application must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under [insert the applicable code section]." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

The above-identified application became abandoned for failure to timely and properly reply to the Notice of Allowance and Issue Fee Due, mailed August 12, 2005. The Notice(s) set a non-extendable three (3) month period for reply. No reply having been received, the application became abandoned on October 13, 2005. A Notice of Abandonment was mailed June 8, 2006.

**The instant petition**

Applicant files the instant petition wherein Applicant asserts that the first two pages of the three-page Notice were not

received, and therefore the issue fee could not be paid. Applicant states that upon receipt of the one page of the Notice, Applicant telephoned the Office and was informed that a new Notice of Allowance would be mailed. Applicant has not received the Notice of Allowance. Applicant provides a copy of her docket records as evidence of non-receipt.

An allegation that an Office action was not received may be considered as a petition for the withdrawal of the holding of abandonment. If the allegation is adequately supported, the petition may be granted and a new Office action mailed. The showing required to establish non-receipt of an Office communication must include:

1. A statement from the Applicant stating that the Office communication was not received by the Applicant and attesting to the fact that a search of the file jacket and docket records indicate that the Office communication was not received.
2. A copy of the file jacket or docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in Applicant's statement.

The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt....

### **Analysis**

In this instance, Applicant admits receipt of one page of the Notice of Allowance and the Notice of Allowability. However, a review of the docket records provided with the petition fail to indicate receipt of neither the one page of the Notice of Allowance, nor the Notice of Allowability.

Applicant also provides that a telephone call was immediately placed to this Office wherein she was informed that a new Notice of Allowance would be mailed. Applicant provides no additional evidence as to the date or time of the telephone call, or from whom Applicant received the promise of re-mailing of the Notice. Applicant is advised that "[a]ll business with the Patent and Trademark Office should be transacted in writing. [] The action

of the Patent and Trademark Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt. See 37 CFR 1.2.

Applicant is advised that the USPTO file is the official record of the papers in the application. A review of the official file revealed that the Notice of Allowance and issue Fee Due mailed in this application was properly mailed to the correspondence address of record and consisted of three pages. Absent any irregularities in the mail, correspondence is presumed to have been delivered to the correspondence address of record. A review of the file reveals no irregularity in the mailing. In fact, Applicant admittedly received one page of the Notice of Allowance and the Notice of Allowability.

### **Conclusion**

Applicant's assertion, that the Notice was not received, is insufficient to justify withdrawing the holding of abandonment. The evidence presented by Applicant fails to overcome a conclusion that the Notice may have been lost after receipt.

### **Alternative venue**

Applicant is strongly urged to file a petition stating that the delay was unintentional. Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an "unintentionally" abandoned application without a showing that the delay in was "unavoidable." An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the required fee, currently \$750.00.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay can not make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement

that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revive under 37 CFR 1.137(b).


Further correspondence with respect to this matter should be addressed as follows:

By mail: Commissioner for Patents  
PO Box 1450  
Alexandria, VA 22313-1450

By FAX: (571) 273-8300  
Attn: Office of Petitions

By hand: Customer Service Window  
Randolph Building  
401 Dulany Street  
Alexandria, VA 22314

Telephone inquiries concerning this matter should be directed to the undersigned at (571) 272-3232.

  
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